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No. 97 1883 MAY 2 1 1998

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In The

Supreme Court of the United States

October Term, 1997

CHARLES X. DANIELS and JINO S. ST. LOT,

Petitioners,

vs.

SIX-L'S PACKING CO. and LAWRENCE LIPMAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil rights litigant deprived of his constitutional right to a fair trial where the trial judge displays open hostility toward his counsel in the presence of the jury and betrays the appearance of impartiality?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Farm-Op, Inc., a defendant below, is no longer a party to the proceeding.

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Petitioners Charles X. Daniels and Jino S. St. Lot ("Daniels and St. Lot") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") in this case.

OPINIONS BELOW

The Court of Appeals' decision, which was rendered without an opinion on December 16, 1997, is reported at *Daniels et al. v. Six-L's et al.*, 132 F.3d 1460 (11th Cir. 1997). (App. A). The unofficial report is located at 1997 U.S. App. LEXIS 38190.

The Court of Appeals' denial of the suggestion for rehearing *en banc*, which was rendered without an opinion on February 20, 1998, is reported at *Daniels et al. v. Six-L's et al.*, 137 F.3d 1357 (11th Cir. 1998). (App. C). The unofficial report is located at 1998 U.S. App. LEXIS 7612.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1997. The Court of Appeals denied a timely suggestion for rehearing *en banc* on February 20, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Due Process Clause

STATEMENT OF THE CASE

The fundamental question in this case is whether Daniels and St. Lot, Title VII litigants, are entitled to a new trial where the trial judge displayed open hostility toward their counsel in the presence of the jury and betrayed the appearance of impartiality, depriving them of a fair trial.

The original jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1331.

Daniels and St. Lot sought redress for race-based employment discrimination pursuant to Title VII, 42 U.S.C. § 2000e *et seq.*, as amended, and 42 U.S.C. § 1981, and for common law negligent supervision.

Respondent Six-L's Packing Co. ("Six-L's") moved for summary judgment on April 26, 1996 and, upon further discovery proceedings, amended its motion for summary judgment on September 9, 1996. At oral argument on Six-L's summary judgment motion on November 29, 1996, the district court examined the sufficiency of every aspect of this case in comprehensive detail. The district court then denied Six-L's motion for summary judgment on December 20, 1996, and set the case for jury trial.

The jury trial took place on January 13, 21-29, 1997. The facts adduced at trial were as follows:

Daniels and St. Lot, black males, were long-time employees of Six-L's. Six-L's is a family-owned company that sells and markets produce.

On January 13, 1994, Daniels was terminated by Jack Poklemba, the recently hired packing house supervisor, who

handed him a letter of termination. Poklemba informed Daniels that he was being terminated for sexually harassing Griselda Jaques, a female co-worker, and for failing to apologize to her.

Although the stated reason for Daniels' termination was his failure to apologize to Jaques, Joseph Taylor, Six-L's human resources manager, admitted he was personally aware that Daniels had apologized to Jaques on two occasions and, indeed, that he was present when Daniels apologized to Jaques the second time. Daniels denied harassing Jaques. Jaques never made a claim of sexual harassment against Six-L's.

As the personnel manager for Six-L's, Taylor investigated at least ten incidents of sexual harassment involving non-black employees, none of whom was disciplined or terminated by Six-L's.

Approximately one month before Daniels was terminated and before the alleged incident involving Jaques, Poklemba had said to James Wheeler, a white Six-L's employee, "Bear with me and give me a few weeks and I'll eliminate Charlie."

On the morning of Daniels' termination, just before Poklemba delivered the termination letter, he stopped by St. Lot's office and stated, "I got Charlie now. I got that nigger now."

St. Lot had been employed with Six-L's since age 18 and had worked there 12 years when he was terminated from his supervisory position on March 25, 1994 after a heated argument with Gary Crossno, the company mechanic.

St. Lot was terminated by Poklemba and Taylor, who simultaneously handed him a letter of warning and a termination letter. Initially, St. Lot was informed that he was being fired for

arguing with Crossno. Later, he was told he was terminated for refusing to work with Crossno after their confrontation. St. Lot denied ever refusing to work with Crossno.

After terminating St. Lot, Poklemba informed him that he had five minutes to leave the premises. When St. Lot asked what he meant, Poklemba stated, "You heard me, nigger, I give you five minutes to get out of the plant." After St. Lot was fired, Poklemba also told him, "I told you, nigger, I was going to get you."

On numerous occasions, Poklemba was heard uttering racial slurs and remarks. For example, during a confrontation with Daniels, Poklemba stated, "You niggers get in a position, you want to run things" and, referring to whites running the company, "We run things around here." Daniels and St. Lot testified that Poklemba regularly referred to the black workers at Six-L's as "niggers" and "monkeys."

Taylor, the personnel manager, testified that other Six-L's employees had complained to him that Poklemba used racial slurs like "monkeys" and remarks like "they stink" when referring to blacks and Haitians, and that he had reported the complaints to management but knew of nothing that was done to curb Poklemba's racial tirades. On other occasions, Poklemba remarked that the company "had too many niggers working for them and he would like to get rid of a few" and "I should fire all of you niggers." During a strike by Haitian plant workers the day before Daniels was terminated, Poklemba was heard to say, "Them niggers don't know what they got."

During the trial, The Hon. Thomas Wiseman, a retired visiting judge from Nashville, Tennessee, who was assigned the case on the eve of trial, directed pervasive and inflammatory comments at Nicolas A. Manzini, counsel for Daniels and St. Lot, in the presence of the jury.

On more than 80 occasions, Judge Wiseman berated and criticized or admonished Manzini in front of the jury, starting during jury selection and opening statements and continuing through closing arguments. On at least two occasions, Judge Wiseman openly threatened to declare a mistrial or dismiss the case as a sanction against Daniels and St. Lot. On 29 of those 80 occasions, Judge Wiseman's successive interruptions and criticisms were leveled without any pending objection from opposing counsel. The majority of the slights were leveled at Manzini during his presentation of Daniels and St. Lot's case-in-chief. Judge Wiseman's bellicose demeanor and tone and his relentless comments to and about Manzini conveyed to the jury his disapproval of Daniels and St. Lot's case.

Judge Wiseman interrupted Manzini on 27 separate occasions during his examination of Daniels alone, beginning with the following comment at page 88 of volume 1 of the trial transcript, without being prompted by any objection from the other side:

> Now, wait, Mr. Manzini. You know that is incompetent. Listen, don't you do that again, Mr. Manzini. When you know something is an incompetent question, don't you ask it in this Court. I don't know what your usual practice is down here, but it doesn't work here.

At page 89 of volume 1, Judge Wiseman again interrupted Manzini's examination of Daniels:

> Now, Mr. Manzini — ladies and gentlemen, step out of the room just a minute please. It's all right, just step out of the room. Go ahead . . .

Outside the presence of the jury, Judge Wiseman threatened:

> Mr. Manzini, I've cautioned you about this once. This is caution number two. If you do this again, I'm going to declare a mistrial. Do you understand that?"

When the jury returned to the courtroom, Manzini continued with his examination of Daniels, only to be interrupted by Judge Wiseman again.

At page 93 of volume 1:

> Just ask him if he recognizes it. Ask him what it is.

At page 98:

> Mr. Manzini, it's not necessary for you to repeat the testimony. Just ask another question. That evidence is in.

At page 99:

> That's not the proper use of the deposition, Mr. Manzini . . . Let's get on with it.

At page 110:

> Sustained. Ladies and gentlemen, disregard that, please. That's not personal knowledge either. Go ahead.

At page 117:

> No, sir, she's not a company agent. You haven't demonstrated she's in any position of management

or control, so you're trying to get it in under 801(d)(2), and that doesn't work, Mr. Manzini. Objection is sustained.

At page 123:

Yes, sir. Lay the foundation, if he knows. Lay some foundation of personal knowledge about that, Mr. Manzini.

At page 127:

No, no, no sustained.

At page 128:

Sustained, sustained. Don't tell us what Roger Bennett said now. Go ahead, ask another question, Mr. Manzini.

At page 129:

We're going to give him a little latitude. Now, go right ahead Mr. Manzini, and don't lead him, please, just let him testify.

At page 143:

We're not here about guesses, Mr. Manzini.

During Manzini's re-direct examination of Daniels, at volume 2, page 71:

Your comments are arguments.

At page 74:

> No, no, no, no . . . Now you're clearly leading him.

At page 82:

> Mr. Manzini, you can ask questions without being quite so leading . . . Well, you let the witness testify. You're not testifying. You're not under oath.

At page 84:

> Mr. Manzini, that is an improper question and you know that is an improper question. Now, you may ask him why he filed the lawsuit.

At page 85:

> Any further questions?

At page 87:

> Now, wait a minute. When I sustain an objection, Mr. Daniels, you don't answer the question. Ask another question, Mr. Manzini . . . Ask a proper question, Mr. Manzini.

Finally, at page 89, during Manzini's re-direct examination of Daniels, and *in the jury's presence*, Judge Wiseman threatened:

> Sustained. Mr. Manzini, if you don't quit leading this witness, I'm going to carry through on what I promised you earlier.

Shortly afterward, Judge Wiseman berated Manzini yet again, this time openly threatening a mistrial in front of the jury. In doing so, he let the jury know that this was not the first time he had threatened to declare a mistrial and end Daniels and St. Lot's case. At page 91:

> Now, Mr. Manzini, in case you don't know, a leading question is a question that suggests the answer to the witness . . . And you're repeatedly violating the rule of law and rule of evidence and you ought to know better. *And I had cautioned you about it a number of times and if you don't stop, I'm going to declare a mistrial . . . It better come first nature for you not to do it, Mr. Manzini, because it's not going to happen in this Court. I don't know where you practice, it's not going to happen here. Now, I've cautioned you out of the presence of the jury. I'm doing it in the presence of the jury now because I want you to stop.*

(Emphasis added.)

Judge Wiseman continued at page 93:

> Now, ladies and gentlemen, disregard that. *Mr. Manzini is not under oath. Mr. Manzini is not testifying. And what he's doing now, he's trying to testify, and that is improper under the rules of this Court and under the Federal Rules of Evidence . . .* Now, you may ask again, Mr. Manzini, and you try to properly phrase it.

(Emphasis added.)

At page 95:

> Mr. Manzini, who do you think you worked for is the way to ask that question. And the previous question, did you think your checks — who did your checks come from, who did your checks come from. Mr. Manzini, have you finished with this witness?

Judge Wiseman's interruptions and criticisms of Manzini continued throughout the remainder of Daniels and St. Lot's presentation of their case. Indeed, during Manzini's examination of prosecution witness Willie Callins, Judge Wiseman threatened yet again in the presence of the jury:

At volume 3, page 208:

> No, sir. I've ruled on this now, Mr. Manzini, and you may ask another question, but you may not ask this question again and you may not be heard further on it. Now, go ahead . . . Sustained, Mr. Manzini. That is asking the same question in a different language. *If you don't start abiding by the rules of evidence and abide by this Court's rulings, Mr. Manzini, I'm going to take sanctions against you . . . up to and including dismissal of your client's case. You're exceeding the bounds, Mr. Manzini, and I'm not going to put up with it much longer.*

(Emphasis added.)

Even during Manzini's cross-examination of defendant Lawrence Lipman (when great latitude is usually afforded counsel), Judge Wiseman's criticisms and interruptions continued, with Judge Wiseman assuming an adversarial role.

At volume 4, page 145:

> It is sustained. Let the jury make those comparisons, Mr. Manzini.

At page 156, with no objection pending:

> Now, everybody stop. Mr. Manzini, you phrase your questions in such a way that a yes or no answer is called for.

At page 159:

> Yes. Sustained. Ladies and gentlemen, I'll tell you what the trial is about at the appropriate time.

At page 160, with no objection pending:

> Now, wait just a minute. Wait just a minute. Number one, don't argue with the witness. Number two, don't ask another question until he's finished with his answer, please, Mr. Manzini. Ask another.

At page 161, with no objection pending:

> Now, Mr. Manzini, let him finish his answer . . .

At page 161, when Manzini suggested that Lipman had not fully answered a question:

> Yes, sir, he certainly has. We've been over this several times now, Mr. Manzini. Please move on to something else.

At page 170:

> Yes, sir. Mr. Manzini, save your argument for the appropriate time, please.

At page 175:

> That's not a question. Ask a question, Mr. Manzini.

At page 176, with no objection pending, Judge Wiseman volunteered:

> *Ladies and gentlemen, I want to remind you of something. A statement made in the course of a question is not proof of the truth of that fact. It is not — unless it's agreed to by the witness, it is proof of nothing . . . Now, I don't know whether there's been any testimony in this case. It's up to you to decide whether there's been any testimony in this case that the truck sat outside Gary Crossno's office for two days with the keys in it . . . I don't remember that testimony, but Mr. Manzini has just asked a question as if that were the testimony. And I don't recall hearing it.* That's up to you to decide what has been testified to and what has not . . . Continue, Mr. Manzini.

(Emphasis added.)

At page 181, with no objection pending, Judge Wiseman again volunteered:

> *Ladies and gentlemen, we're not here to try what is fair. We're not here to try whether or not we might have done something differently. We're here to try*

> *whether or not Mr. Jino St. Lot was fired because of racial considerations . . . You and I might have done something different in this case. You and I might not think it's fair. But that is not what we're here about.* We're here only to determine whether or not he was fired because of his race . . . Now, confine yourself, Mr. Manzini, to questions that are relevant.

(Emphasis added.)

At page 187 with no objection pending:

> Mr. Manzini, we've been over that, over that and over that. Now, go ahead, please, conclude your examination.

At page 189:

> Mr. Manzini, move on, please. You've — you're wearing us out now. Go on.

Even when he was inclined to agree with Manzini and overrule an objection from the other side, Judge Wiseman had something derisive to say. For example, during Manzini's closing argument, counsel for Six-L's objected to his characterization of the evidence and the credibility of a witness. Judge Wiseman stated, at volume 6, page 233:

> Well, that's — he's suggesting to the jury that this is what they should — the way they should judge the testimony . . . Remember, ladies and gentlemen, the lawyer's opinion, the lawyer's personal opinion is just not relevant to the case at all . . . *So, don't do that again, Mr. Manzini.*

(Emphasis added.)

On January 29, 1997, after a seven-day trial, the jury returned a verdict against Daniels and St. Lot and in favor of Six-L's.

On February 10, 1997, Daniels and St. Lot filed their notice of appeal to the United States Court of Appeals for the Eleventh Circuit. Oral argument was held on December 11, 1997, before a three-member panel of the Court of Appeals consisting of The Hon. Dubina, Circuit Judge, and the Hons. Fay and Keith[1], Senior Circuit Judges.

At the outset of oral argument, Judge Fay asked Daniels and St. Lot's appellate counsel to identify any erroneous rulings made by the trial judge in conjunction with his admonitions and comments to trial counsel (Manzini) and suggested that the trial judge's conduct was justified. Judge Fay referred to Manzini's incompetence in framing questions that were not leading in nature or that did not elicit hearsay testimony.

Judge Dubina asked Daniels and St. Lot's counsel what she would have done if she were the trial judge, and whether a curative instruction regarding the Judge Wiseman's comments and admonitions during the trial was given to the jury.

Lastly, Judge Keith asked Daniels and St. Lot's counsel to articulate the standard of review (plain error) and whether Manzini had sought a mistrial.

On December 16, 1997, the three-member panel affirmed the judgment below without an opinion.

Thereafter, on February 20, 1998, the Court of Appeals denied Daniels and St. Lot's timely suggestion for rehearing *en banc*.

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1. Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' ENDORSEMENT OF THE TRIAL JUDGE'S CONDUCT AND HIS DEPARTURE FROM THE APPEARANCE OF STRICT IMPARTIALITY THREATENS THE FOUNDATION OF OUR JUDICIAL SYSTEM AND INVOKES THIS COURT'S SUPERVISORY POWERS.

In affirming the judgment and denying a new trial, the Court of Appeals disregarded the overpowering influence of the trial judge's every word upon the jury and condoned the trial judge's departure from the appearance of strict impartiality that is the cornerstone of our judicial system. Aside from furthering the encroachment upon Daniels and St. Lot's right to a fair trial, the Court of Appeals telegraphed its growing distaste for employment discrimination cases and removed the welcome mat that once greeted civil rights litigants like Daniels and St. Lot.

It is beyond dispute that

> a fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). To perform its function, "justice must satisfy the appearance of justice." *Murchison*, 439 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1955).

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980), this Court recognized that the "requirement of neutrality in adjudicative proceedings" serves dual interests of equal importance, as

> it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. (Citations omitted).

Hence,

> [T]he neutrality requirement not only guarantees that each litigant receives a fair trial as determined by those learned in the law, but also engenders the faith in the integrity of this country's tribunals that is so unquestionably vital to this government's existence.

Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988). It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the "assurance" of fairness and impartiality. *Connelly v. U.S. Dist. Court*, 191 F.2d 692, 697 (9th Cir. 1951).

Similarly, a civil rights litigant should feel confident that his discrimination claim will be well-received and disposed of fairly and will not be rebuked or derailed by an unreceptive and unfriendly judiciary. The trial judge's caustic conduct toward Daniels and St. Lot's counsel and the Court of Appeals' approval of the trial judge's conduct is indicative of the impatience displayed by some federal courts toward employment

discrimination claimants in recent years, and of the evolving status of discrimination law. Indeed, a large number of employment discrimination cases are now routinely felled at the summary judgment stage. The Hon. Nancy Gertner, *Changing Times: Summary Judgment and Employment Law*, 1996 Annual Convention Manual of the National Employment Lawyers Association.

In a troubling comparison that embodies the federal courts' deteriorating perceptions of employment cases, a federal judge recently described employment discrimination law as the "family law of the 1990's." *Gertner, supra.* In explaining some federal courts' changing attitudes toward employment discrimination cases and the increasingly liberal granting of defendants' motions for summary judgment, Judge Gertner points to the flood of employment cases in federal courts and the lack of resources to meet the increased demand:

> This flood of cases in federal courts has resulted, in part, in a cramping of the courts' historically generous hold of employment discrimination cases; it has also led, in some measure, to the current focus on employment discrimination cases as primarily about "disgruntled employees," dispute resolution and not great principles, and to an unwillingness to stretch increasingly rigid threshold requirements before allowing a case to be heard in federal court.

Judge Gertner also points to the evolving nature of the claims, which are no longer as dramatic or the discrimination as blatant as when Congress first enacted the Title VII laws. In response to employers' increased adeptness at carrying out and covering up discrimination in the workplace, some federal courts have raised the bar on claimants' evidentiary burdens, causing a chilling effect on these claims.

Here, Daniels and St. Lot's claims of race discrimination beat the odds by surviving a rigorous summary judgment

examination that lasted eight months, only to have the responsibility for the trial of their case turned over to a retired visiting judge who was not even aware that a defense motion for summary judgment had been denied in all respects.

As the nature of employment cases has evolved, so have the courts' attitudes. *Gertner, supra.*

> Perhaps, in order to prevent the courts' impatience with the litigation of employment discrimination cases, plaintiffs' attorneys would do well to monitor the kinds of cases brought in federal court and to remind the courts, when they can, of the historic and continuing role that individual employment discrimination cases play in our society's larger goals of social justice and workplace equality.

Gertner, supra.

From the outset of the trial, the trial judge made clear to the jury his displeasure with Daniels and St. Lot's case and he used Daniels and St. Lot's counsel (Manzini) as his punching bag. Beginning with jury selection and on more than 27 occasions during Manzini's presentation of Daniels and St. Lot's case-in-chief, the trial judge displayed open hostility towards Manzini, interrupting his presentation of Daniels and St. Lot's case-in-chief, even when there was no pending objection from Six-L's counsel. The trial judge openly threatened Manzini with mistrial on two separate occasions in the jury's presence, again without prompting from opposing counsel. Each and every time the jury heard the trial judge utter Manzini's name in the courtroom, it was certainly followed by, and subsequently associated with, disapproval.

Through his incessant interruptions of Manzini's examination of witnesses, his repeated criticisms of Manzini

and threats of mistrial, and his obvious impatience with and lack of any deference or respect for Daniels and St. Lot's case, the trial judge conveyed to the jury, wittingly or not, the appearance of partisanship that translated into denial of a fair trial. Through its affirmance and denial of a new trial, the Court of Appeals sanctioned the trial judge's departure from the requisite "appearance of impartiality" and the resulting derailment of Daniels and St. Lot's employment discrimination claims.

II.

THE COURT OF APPEALS' DENIAL OF A NEW TRIAL CONFLICTS WITH PRECEDENT IN OTHER CIRCUITS REQUIRING A NEW TRIAL WHERE THE TRIAL JUDGE'S CONDUCT IN THE PRESENCE OF THE JURY BETRAYED THE APPEARANCE OF IMPARTIALITY.

The Court of Appeals' decision conflicts with decisions in other circuits requiring a new trial where the trial judge's criticism of and hostility toward trial counsel departed from the appearance of impartiality and deprived the litigants of a fair trial.

The Court of Appeals determined that the trial judge's conduct and comments directed at Daniels and St. Lot's counsel (Manzini) were justified by counsel's own conduct, were technically correct and, therefore, did not warrant a new trial. Although the grounds for the *per curiam* affirmance were not set forth in the Court of Appeals' decision, it is evident from the panel's questions at oral argument and the denial of the suggestion for rehearing *en banc* that the Court of Appeals determined that a new trial was not warranted because the trial judge's interjections and his evidentiary rulings were technically sound. However, the Court of Appeals' judgment conflicts with

precedent in the Second and Fifth Circuits requiring a new trial where the trial judge's numerous comments and criticisms of trial counsel, even if warranted, operated to betray the appearance of strict impartiality that is essential to a fair trial.

Apparently adhering to its own precedent in *Coats & Clark, Inc v. Gay*, 755 F. 2d 1506 (11th Cir. 1985), the Court of Appeals here disregarded the compound and prejudicial effect of the trial judge's comments and criticisms of Daniels and St. Lot's counsel merely because some of his rulings were substantively sound and some of his interruptions appeared justified. Likewise, in *Coats & Clark*, the Court of Appeals determined that a new trial was not warranted where the trial judge's impatience, sarcasm and intemperate remarks toward defendant and his counsel appeared justified. *Id.* at 1512.

However, the Court of Appeals' affirmance directly conflicts with cases in other circuits holding that a trial judge's numerous interjections and hostile conduct toward trial counsel breaches the appearance of strict impartiality and robs the litigant of a fair trial. Even where judicial intervention at trial was justified and the trial judge's admonitions were merited, other circuits have ordered a new trial where the trial judge's remarks toward trial counsel tended to give the jury the impression that his client's case was "of little substance and not worthy of much attention." *United States v. Coke*, 339 F.2d 183 (2d Cir. 1964) ("While to some extent the admonitions were merited . . . the comments of the trial judge were of such a nature that, in the context in which they were made, they must have improperly prejudiced the defense in the minds of the jurors"); *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968) ("Even if there is some basis for some criticism of overpartisanship, of defense counsel, this does not justify unwonted and unnecessary continuous interruptions. A trial judge must strive for total neutrality and complete circumspection, in the eyes and minds

of the jury"); *A.C. Newman v. A.E. Staley Manufacturing Co.*, 648 F. 2d 330 (5th Cir. 1981); *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977) ("Even if the judge's disapproval was occasionally warranted by defense counsel's conduct, we find slight, if any, justification in the record for the judge's sarcasm, his frequent interruptions and his antagonistic comments in the jury's presence.")

Moreover, in carrying out his role to ensure the proper presentation of evidence, often times a trial judge must make remarks from the bench within earshot of the jury. *Bursten v. United States*, 395 F.2d 976 (5th Cir. 1968); *United States v. Lanham*, 416 F.2d 1140 (5th Cir. 1969); *Travelers Ins. Co. v. Ryan*, 416 F.2d 362 (5th Cir. 1969); *United States v. Cisneros*, 491 F.2d 1068 (5th Cir. 1974); *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977); *A.C. Newman v. A.E. Staley Manuf. Co.*, 648 F.2d 330 (5th Cir. Unit B 1981). Where mild admonitions to counsel do not suffice, any sterner or more forceful directions which may be warranted should be given outside the presence of the jury. *United States v. Coke*, 339 F.3d 183 (2d Cir. 1964).

Moreover, even where

> remarks by the district judge within the hearing of the jury are often necessary, the judge should take care not to give the impression that he or she prefers one litigant over another.

Newman, *supra*, 648 F.2d at 334. Thus, the primary consideration is not whether the trial judge's numerous remarks and rulings were warranted, but whether their delivery tended to prejudice the jury against Daniels and St. Lot and, therefore, deprived them of a fair trial.

The trial judge departed from the appearance of neutrality when he demeaned Manzini's abilities as trial counsel and his credibility, and when he interjected his own *sua sponte* objections to even mildly leading questions by Manzini that were designed to streamline the testimony of inexperienced or hostile witnesses.

The trial judge's overreaction to Manzini's style of examination demonstrated to the jury the trial judge's impatience not only with Manzini, but with Daniels and St. Lot's case. For example, when Manzini asked Daniels on re-direct examination about his two previous attorneys and why they no longer represented him in the case (a subject that Six-L's counsel had covered extensively on cross-examination), the trial judge, without a pending objection from Six-L's, stopped Manzini and threatened a mistrial in the presence of the jury:

> THE COURT: Now, Mr. Manzini, in case you don't know, a leading question is a question that suggests the answer to the witness.
>
> MR. MANZINI: I apologize.
>
> THE COURT: And you're repeatedly violating the rule of law and rule of evidence and you ought to know better. And I had cautioned you about it a number of times and if you don't stop I'm going to declare a mistrial.
>
> MR. MANZINI: I apologize. It's second nature and I apologize.
>
> THE COURT: It better become first nature for you not to do it, Mr. Manzini, because it's not going to happen in this Court. I don't know where you

> practice, it's not going to happen here. Now, I've cautioned you out of the presence of the jury. I'm doing it in the presence of the jury know because I want you to stop.

The trial judge seized every opportunity to chastise and argue with Manzini during the presentation of Daniels and St. Lot's case. The trial judge went so far as to tell the jury (erroneously) that this case had nothing to do with "fairness." Fairness is, indeed, an aspect of an employment discrimination case, especially where a litigant relies on evidence of disparate treatment to establish his *prima facie* case (as did Daniels and St. Lot). Disparate treatment centers on fair and even application of workplace rules.

Coupled with his numerous threats in front of the jury to dismiss or mistry Daniels and St. Lot's case, the trial judge's quickness to chide Manzini at every turn and his non-stop belligerent comments left the jury with the indelible impression that the trial judge did not think Daniels and St. Lot had much of a case.

In determining whether the trial judge's conduct deprived Daniels and St. Lot of a fair trial, it was not necessary to demonstrate actual bias by the trial judge, but whether his conduct breached the "appearance of strict impartiality." *A.C. Newman v. A.E. Staley Manufacturing Co.*, 648 F.2d 330 (5th Cir. 1981). Daniels and St. Lot respectfully submit that the trial judge's hostility toward their counsel (Manzini) infused the trial proceeding, prejudiced the jury against Daniels and St. Lot, and requires a new trial. The Court of Appeals' refusal to award a new trial cuts against settled law in other circuits and invokes this Court's jurisdiction.

CONCLUSION

This case presents a question of significant importance — whether litigants are entitled to a new trial where the trial judge prejudiced the jury with his hostility toward their counsel and his open and utter disrespect for their civil rights case. By granting Daniels and St. Lot's petition for certiorari this Court can correct the Eleventh Circuit's departure from those cases requiring a new trial where the trial judge's criticisms of counsel and incessant interruptions, even if warranted, likely prejudiced the jury and deprived the litigants of a fair trial. By granting certiorari, this Court can also correct what is emerging as a troubling trend among some federal courts whose disfavor of discrimination claims is having a palpable and chilling effect on employment discrimination cases. In so doing, this Court can reaffirm the critical and momentous role played by the trial judge in our judicial system and in the civil rights forum.

Accordingly, Daniels and St. Lot respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 16, 1997

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-2176

D. C. Docket No. 95-764-CIV-T-24B

CHARLES X. DANIELS, JINO S. ST. LOT,

Plaintiffs-Appellants,

versus

SIX L'S PACKING, INC., a Florida Corporation, FARM-OP, INC., a Florida Corporation, LAWRENCE LIPMAN, individually,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(December 16, 1997)

Before DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

---

* Honorable Damon J. Keith, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiffs-appellants."

Judgment Entered: December 16, 1997
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/3/98

REISSUED AS MANDATE: 3/12/98

---

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or orderly be affirmed or enforced without opinion.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION FILED JANUARY 30, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NUMBER: 95-764-Civ-T-24B

CHARLES X. DANIELS and JINO S. ST. LOT,

VS.

SIX L'S PACKING COMPANY, INC., a Florida corporation, and FARM-OP, INC., a Florida corporation

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the court for trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the defendant's SIX L'S PACKING COMPANY, FARM-OP, INC., and LAWRENCE LIPMAN, and against the plaintiff's CHARLES X. DANIELS and JINO S. ST. LOT.

January 30, 1997 **RICHARD D. SLETTEN,CLERK**

(By) s/ Kathy Thomas
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 20, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-2176

CHARLES X. DANIELS, JINO S. ST. LOT,

Plaintiffs-Appellants,

versus

SIX L'S PACKING, INC., a Florida Corporation, FARM-OP, INC., a Florida Corporation, LAWRENCE LIPMAN, individually,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion , 11th Cir., 19__, __F.2d __).

Before: DUBINA, Circuit Judge, FAY and KEITH*, Senior Circuit Judges.

---

* Honorable Damon J. Keith, Senior, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

(2)

FILED
JUN 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1883

In The

Supreme Court of the United States

October Term, 1997

CHARLES X. DANIELS and JINO S. ST. LOT,

Petitioners,

vs.

SIX L'S PACKING COMPANY, INC., FARM-OP, INC., and LAWRENCE LIPMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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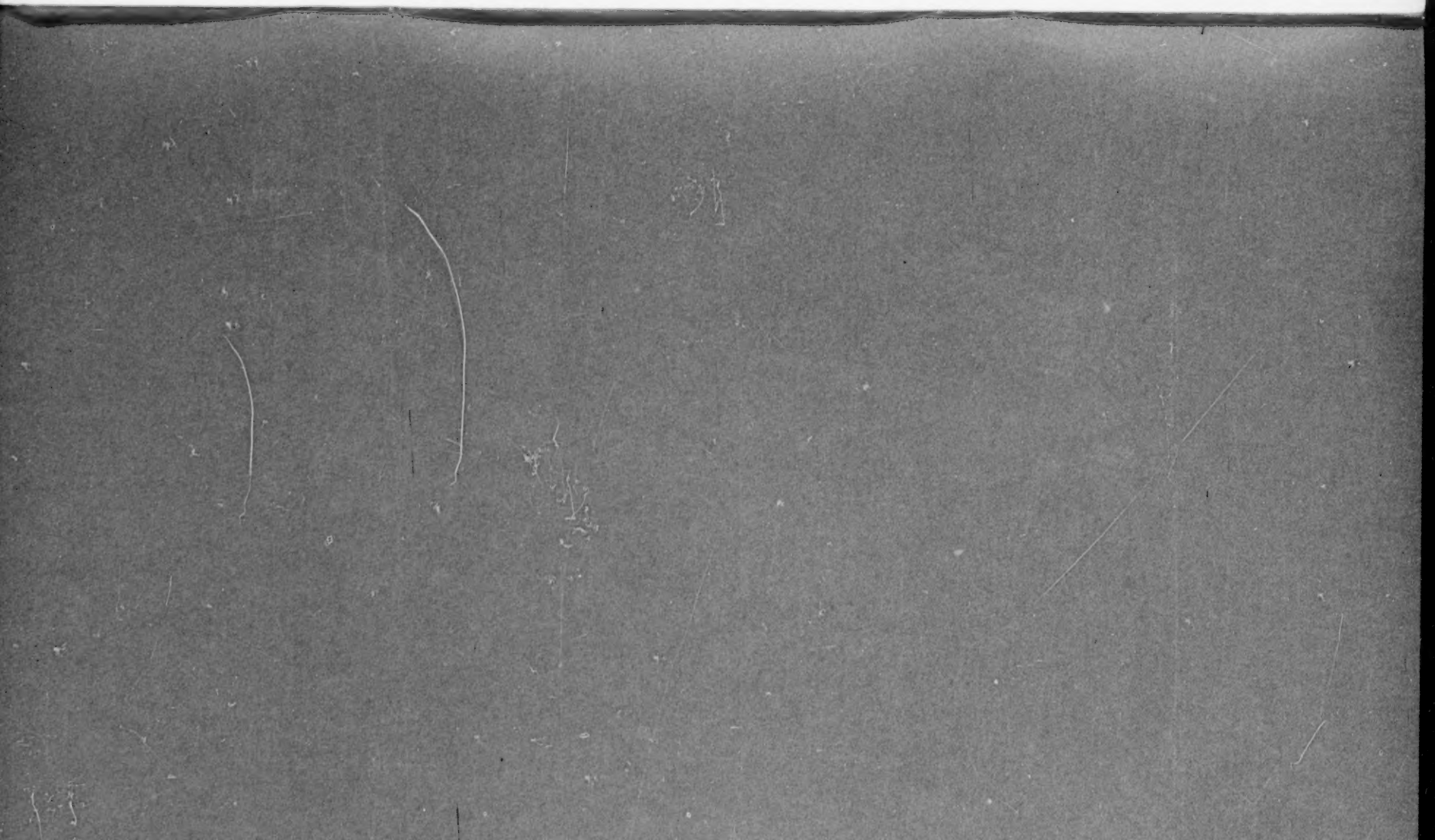

QUESTION PRESENTED

The question as phrased by Petitioners provides no guidance in this case, since the obvious answer to the question would be in the affirmative. The question which was presented to the Circuit Court was whether the manner in which the trial court conducted the trial constituted "plain error," not whether a betrayal of the appearance of impartiality deprives a civil rights litigant of the constitutional right to a fair trial.

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OTHER AUTHORITIES CITED:

16B & 17, Charles A. Wright et al., *Federal Practice and Procedure* §§ 4004.1 & 4035 (2d ed. 1996, 1988) 4

STATEMENT OF THE CASE

The Petitioners do not refer to the Appendix to their Petition when they make their lengthy recitation of the facts. Also, they state the fundamental question in this case in terms which incorrectly indicate that it has been established that the trial judge displayed open hostility toward Petitioner's counsel in the presence of the jury and betrayed the appearance of impartiality, depriving them of a fair trial. Respondents suggest that the Petition should be denied based on the fact that the Petitioners have not provided the Court with an adequate appendix under Supreme Court Rule 14(i). The factual representations by the Petitioners are not supported by the missing record. If the Court is going to consider the Statement of the Case as if it were supported by citations to an appendix, Respondents have included in the appendix to this brief a copy of the Statement of the Case contained in their Appellees' Brief before the Circuit Court. Each statement of fact contained in the appendix to this brief is supported by a citation to the record which was before the Circuit Court.

On page 14 of the Petition, the Petitioners make representations regarding the oral argument before the Eleventh Circuit Court. Respondents are unaware of the source of these representations. Respondents do not stipulate that the Petitioners have accurately portrayed the content of the oral argument.

SUMMARY OF ARGUMENT

Although the Petition is fact-intensive, the Petitioners have provided no record to support their factual representations. Instead, they represent that the evidence established without dispute that their constitutional rights were violated, and that the Eleventh Circuit Court of Appeals decided that the deprivation of constitutional rights would go unremedied because the Court does not like employment discrimination cases. If these extraordinary charges were true, the Petitioners would have provided a record supporting them. The actual question presented to the Eleventh Circuit Court was whether the Petitioners/Appellants had met the "plain error" standard of review. There is nothing in this fact-based case which indicates that it would be appropriate for certiorari review by this Court.

ARGUMENT

Both of the argument headings in the Petition assume as fact that the District Court denied the Petitioners' due process rights, and that the Eleventh Circuit Court endorsed that denial of due process. The Petitioners provide no support for the claim that the decision by the Eleventh Circuit Court of Appeals endorsed the denial of anyone's constitutional rights. There is nothing in the appendix which would indicate that the issue presented to the Eleventh Circuit Court of Appeals was whether it should endorse a denial of constitutional rights. The issue

before the Court was whether the Petitioners had established plain error, not whether the Court should endorse a denial of constitutional rights.

The Petitioners' argument assumes its own premise. It assumes that a denial of due process occurred, and that the Eleventh Circuit Court approved of that denial of due process. In actuality, the Petitioners are unhappy with the result in the prior courts, and they are requesting that this Court review the voluminous record to determine whether the Eleventh Circuit Court should have found plain error. This case does not present any of the considerations governing review on certiorari specified in Sup. Ct. R. 10.

The Respondents have no dispute with the holdings in the cases cited by Petitioners. Certainly litigants should not be deprived of their right to a fair trial. The fact that litigants are entitled to a fair trial does not mean that these litigants were denied that right. The decision by the Eleventh Circuit Court was based on the failure of the Petitioners to meet the plain error standard of review, not a determination that they should be denied their rights. The Petitioners cite to seminar materials for the proposition that federal courts routinely dispense with employment discrimination cases based on something other than their merits. They assert that employers are becoming increasingly adept at covering up discrimination, and that the federal courts "have raised the bar" on claimants' evidentiary burdens, causing a chilling effect on these claims. The counterpoint to the seminar materials is that employers appear to have become increasingly aware of the laws regarding employment discrimination, and that they have taken steps to ensure

that discrimination does not occur. If there are more summary judgments in employment discrimination cases, those summary judgments reflect an increase in baseless litigation because of increased consciousness of employment discrimination law.

A decision by this Court in this case would have no effect on existing law. Neither the decision by the Eleventh Circuit Court nor the decision by the District Court was reported. If this Court were to review this case on the merits, it would simply be reviewing the lengthy transcript of trial in an effort to determine whether plain error occurred. In its unpublished decision, the Eleventh Circuit Court necessarily concluded that plain error had not been established. The Court did not rule that litigants in employment discrimination cases are not entitled to a fair trial. If certiorari review is appropriate in this case, it is appropriate in every case in which a litigant does not prevail on a claim of a violation of constitutional rights. Any litigant who loses on such an issue could make the assumption that the trial court denied his or her rights, and that the circuit court affirmance was an endorsement of the denial of constitutional rights by the trial court. *See generally,* 16B & 17, Charles A. Wright et al., *Federal Practice and Procedure* §§4004.1 & 4035 (2d ed. 1996, 1988).

CONCLUSION

The position of the Petitioners is identical to the position of any other litigant who loses a case where it is asserted that his/her constitutional rights were violated. The Petitioners have presented no basis for this Court to exercise its certiorari jurisdiction. The Respondents request that the Petition be denied.

Respectfully submitted,

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No. 97-1883

In The

Supreme Court of the United States

October Term, 1997

CHARLES X. DANIELS and JINO S. ST. LOT,

Petitioners,

vs.

SIX L'S PACKING COMPANY, INC., FARM-OP, INC., and LAWRENCE LIPMAN,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case from Appellees' Brief before Eleventh Circuit Court of Appeals A1

STATEMENT OF THE CASE

i.

Course of Proceedings and Dispositions in the Court Below

Daniels and St. Lot sued the Appellees, alleging civil rights violations under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000(e), et seq., under 42 U.S.C. § 1981, and for damages arising out of common law negligent supervision (RE at 2, V2-54). Daniels and St. Lot filed motions in limine regarding letters of determination by the EEOC, requesting that the Court exclude the letters from evidence at trial. (V3-98, 105). In the Daniels motion, it was asserted that the EEOC had issued a letter of determination on February 27, 1995, prior to the filing of this suit. (V3-98 at 1). In that letter, the investigator stated that the evidence obtained during the investigation did not establish a violation of the statute. (V3-98 at 2). The basis of the motion was the assertion that the " . . . letter of determination is clearly not trustworthy, and any probative value that such letter may have is substantially outweighed by the danger of unfair prejudice being done to the Plaintiff and the threat that juror confusion will be created and that the jury will be misled thereby." (V3-98 at 2). The basis of the motion by St. Lot is identical. (V3-105 at 1-2). Both motions were denied as to the EEOC letters with the recommendation that the trial judge give a cautionary jury instruction. (RE 5 at 1, V5-181 at 1). Counsel for Daniels and St. Lot first drew the jury's attention to the EEOC letters in his opening statement, (V9-232 at 37-38), where he instructed the jury that the

document " . . . is not worth any more than any other witness who might testify before you . . . ." *Id.* at 37. The actual objection to the admissibility of the letters at trial consisted of the following dialogue:

> MR. MANZINI: We have no objection to anything but these letters of determination from the EEOC, which are third-party documents. I assume the rule has been cited as the exception to the hearsay rule on business records. This is not –
>
> THE COURT: Official investigations required by statute, that is 803(8). Business records is 803(6), this is 803(8).
>
> MR. MANZINI: All right. You know, they had listed a witness from the EEOC to be here and not only to authenticate, but I thought I would be able to ask that with questions such as, did you interview all of the witnesses that were given to you; and if so, what did they say?
>
> THE COURT: I think you brought that out, did you not, Mr. Manzini? I recall your cross-examination of – or it was during your direct examination of some of the witnesses that at least interviews were not conducted.
>
> MR. MANZINI: I did ask –
>
> THE COURT: I believe they're admissible, Mr. Manzini. I will instruct the jury, however, that they are not dispositive of any issue and they may consider them for whatever they're worth.
>
> MR. MANZINI: Okay, Judge.
>
> (V14-237 at 87-88).

The initial brief asserts without referencing the record that Daniels and St. Lot attempted to introduce Mr. Taylor's opinion regarding the motivating factors behind the decision to terminate their employment. (Brief at 12). The brief continues with the assertion without citation to the record that Judge Wiseman granted a motion in limine prohibiting them from eliciting Mr. Taylor's opinion or questioning him about other inculpating statements made during his deposition. (Brief at 12). The brief continues by making representations regarding the contents of a deposition of Mr. Taylor taken November 10, 1995. (Brief at 12). These representations do not reference the record, although there is a reference to the Records Excerpts which were filed with the initial brief. (Brief at 12-13). The deposition of Mr. Taylor was never offered into evidence.

Daniels and St. Lot represent that Judge Wiseman directed "pervasive inflammatory and mostly gratuitous comments" at their attorney, Mr. Manzini. (Brief at 14). There are also references to Judge Wiseman allegedly berating, criticizing or admonishing Mr. Manzini in front of the jury. (Brief at 14). Daniels and St. Lot also represent:

> Unfortunately, the cold transcript does not fully depict Judge Wiseman's bellicose demeanor and tone, or the derisiveness that he conveyed to the jury by his relentless comments and interruptions.
>
> (Brief at 15).

In response, the Appellees invite the Court to read in context each of the rulings by Judge Wiseman which contains a reference to the record. Also, the Court should

consider the following instruction by Judge Wiseman prior to opening statements:

> You are the exclusive judges of the evidence, of the credibility of witnesses and the facts of the case. It's going to be up to you to decide what parts, if any, of a witness' testimony you choose to accept or to reject. The law, however, you should take as I give it you and apply that law to the facts as you find them.
>
> In making those credibility determinations, you should look to a witness' manner and demeanor while on the witness stand, look to whether or not they appear to be telling the truth or appear to be telling a falsehood. Look to whether or not they have an interest in the outcome of the case, whether or not they have a bias or prejudice for one side or the other, whether or not they've become involved in a material contradiction in their testimony, whether at some previous time they've said or done something which is inconsistent with what they tell you here today.
>
> And after reviewing all of these things and anything else that appeals to you in your common sense and good judgment as to whether or not a witness is telling the truth or telling a falsehood, it's going to be up to you to decide whom you believe and how much and which parts of a witness' testimony you choose to believe.
>
> (V9-232 at 18-19).

In the instructions to the jury at the conclusion of the case, Judge Wiseman added:

> You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in Court.

> Deciding what the facts are is your job, not mine. And nothing I've said or done during this trial is meant to influence your decision about the facts in any way.
>
> (V15-238 at 72).

Later in the instructions, he added:

> Several more general points that I want to address before I begin explaining the theories of the parties. The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the Rules of Evidence. Those rules are designed to make sure that both sides receive a fair trial.
>
> And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the Rules of Evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in Court.
>
> (V15-238 at 79).

The final instruction to the jury prior to its retirement, Judge Wiseman stated:

> Now, let me finish up by repeating something I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way, in any way. As far as you're concerned, ladies and gentlemen, I have absolutely no opinion about how you should decide this case. You decide it for yourselves and decide whether or not the Plaintiff has

> proved – each Plaintiff has proved his case against the Defendant or Defendants to your satisfaction.
>
> (V15-238 at 102).

Judge Wiseman's problems with Mr. Manzini are documented in the record. Mr. Manzini repeatedly attempted to solicit obvious hearsay testimony. *See, e.g.,* V9-232 at 79, 81, 83, 88, 89. It was Mr. Manzini's repeated attempts to introduce the same hearsay testimony which led to excusing the jury and giving the caution to Mr. Manzini which is quoted out of context on page 15 of the initial brief. (V9-232 at 91). Shortly after these instructions, it was necessary for Judge Wiseman to stop Mr. Manzini from repeating the answers to questions in followup questions. (V9-232 at 97-98). The actual question which prompted the instruction was:

> You say that he told you that he had no personal knowledge of the things that are written on that document?
>
> (V9-232 at 98).

On the next page in the transcript, Mr. Manzini improperly asked his own client about his testimony in an earlier deposition. *Id.* at 99. In this portion of the transcript, Mr. Manzini repeatedly elicited testimony from his client regarding whether Mr. Poklemba said that he had been present at a meeting. *Id.* at 97, 98, 99. The culmination of the repetitious questioning by Mr. Manzini was:

> Uh, is there any doubt in your mind, and please look at the jury and tell them, that Mr. Poklemba told you he was there when they fired you or when they decided to fire you?
>
> (V9-232 at 99).

Shortly thereafter, Judge Wiseman had to strike more hearsay answers. (V9-232 at 110). More hearsay answers were stricken seven pages later in the transcript. *Id.* at 117. Hearsay objections were sustained on pages 127 and 128 of the same volume. Mr. Manzini was specifically eliciting this hearsay testimony. *See also Id.* at 127, 128. Mr. Manzini concluded his examination of his client by asking him to offer his "best guess" of why he was fired. *Id.* at 143.

The second day of testimony began with Judge Wiseman having to instruct Mr. Manzini to stand when he addressed the Court. (V10-233 at 4). He later had to instruct Mr. Manzini to quit leading his witness. (V10-233 at 89). The initial brief twice quotes out of context a portion of an exchange between Mr. Manzini and the Court. (Brief at 18, 34-35). The actual dialogue, including the omitted portions, stated:

> THE COURT: Now, Mr. Manzini, in case you don't know, a leading question is a question that suggests the answer to the witness.
>
> MR. MANZINI: *I apologize.*
>
> THE COURT: And you're repeatedly violating the rule of law and rule of evidence and you ought to know better. And I had cautioned you about it a number of times and if you don't stop, I'm going to declare a mistrial.
>
> MR. MANZINI: *I apologize. It's second nature and I apologize.*
>
> THE COURT: It better become first nature for you not to do it, Mr. Manzini, because it's not going to happen in this Court. I don't know where you practice, it's not going to happen

here. Now, I've cautioned you out of the presence of the jury. I'm doing it in the presence of the jury now because I want you to stop.

MR. MANZINI: *I apologize. I respect the Court's position on this. I just can't even explain why I do it. It's second nature. I apologize.*

(V10-233 at 91) (italicized portions omitted from quotations in initial brief).

In the previous nine pages of the transcript, objections had been sustained to Mr. Manzini's leading questions on five occasions. *Id.* at 82, 83, 84, 86, 88-89. The dialogue occurred shortly after another objection to the leading questions. *Id.* at 90. Another objection to leading questions was sustained a few pages later. *Id.* at 95.

During the direct examination of St. Lot, the following exchange occurred:

THE COURT: Mr. Manzini, I have to keep telling you that a leading question suggests the answer and it is not permissible for you, as a lawyer in direct examination, to suggest the answer. Now, please try to observe the rules of evidence.

MR. MANZINI: It's force of habit. It's my fault, I apologize.

THE COURT: I don't know where you picked up that habit.

(V11-234 at 118).

A few pages later, the following exchange occurred:

Q. Let's go back to the day that Charlie got fired. Tell us, be very specific, what he actually

said to you when he came to your office that day.

MR. HUME: Your Honor, objection. It's been asked and answered.

THE COURT: That who came to his office?

MR. MANZINI: Mr. Poklemba.

THE COURT: That has been asked and answered. The objection is sustained.

BY MR. MANZINI: Q. I believe you said he used the words, I got Charlie Daniels.

MR. HUME: Objection.

THE COURT: Sustained. Mr. Manzini, I just sustained the objection, then you go right ahead and do it. Disregard that, ladies and gentlemen. Ask another question, Mr. Manzini.

BY MR. MANZINI: Q. What did you think he meant when he used those words?

MR. HUME: Objection.

THE COURT: Sustained.

(V10-233 at 121-22).

A few pages later, the record states:

Q. Do you know if he was suspended, reprimanded or threatened with termination as a result –

MR. HUME: Objection, unless the foundation is laid.

THE COURT: How would he know that, Mr. Manzini, other than by hearsay? How would he

> have personal knowledge of that? The objection is sustained.
>
> MR. MANZINI: Okay.
>
> (V10-233 at 128).

A relevance objection and a hearsay objection were sustained two pages later. *Id.* at 130. The hearsay objection occurred when Mr. Manzini asked Mr. St. Lot to testify regarding whether "word got around" that he had been fired. *Id.*

Another example of Mr. Manzini's trial technique is seen in his cross-examination of Jack Poklemba. (V14-237 at 52-86). For several pages in the transcript, Mr. Manzini made detailed factual representations, and confirmed that Mr. Poklemba did not know those purported facts. *Id.* at 57-59, 73-74. The first round of "don't know" testimony was wrapped up with the following question:

> So, basically, you don't know anything that happened until the morning that you were told to go get the keys from Jino?
>
> *Id.* at 59.

Shortly after this non-testimony, the following exchange occurred:

> BY MR. MANZINI:
>
> Q. Now, you've also – by the way, Mr. Taylor, as we discussed in your deposition, says you're a pathological liar?
>
> A. I disagree with him there, sir.
>
> Q. Do you think he's a pathological liar?

A. No, I don't.

Q. Do you know why he would say that?

(V14-237 at 66).

A review of Mr. Taylor's testimony discloses no such accusation. (V11-234 at 31-171). In his closing argument, Mr. Manzini inaccurately represented to the jury that Taylor had testified that he thinks Jack Poklemba is a pathological liar. (V14-237 at 226). This brief will not address the remainder of the out-of-context quotations except to refer the Court to the record for the proper context. However, it should be pointed out that in closing argument, Mr. Manzini vouched for his clients' positions by stating, "I wouldn't be standing here right now representing Charlie and Jino if I didn't believe that they were treated unfairly." (V14-237 at 215). Judge Wiseman sustained an objection, and the Court instructed the jury that the attorney's personal beliefs had nothing to do with the case, and that they should disregard Mr. Manzini's remark. *Id*. Immediately after that instruction, Mr. Manzini told the jury:

> The – there have been times throughout this trial when I asked questions that – or said things such as I did just now, that were not perfect things to say to a jury. My questions were not perfect either sometimes, and, you know, objections were made and I – I'm not pulling punches here. I mean, sometimes I was wrong and I was taken to task for that.
>
> But I implore you, I beg you to listen to everything that was said to you, and not to hold that – any of what you might perceive was my over zealousness, my willingness to try a different

> approach to have evidence presented to you, that you not hold that against these people because that wouldn't be right and it wouldn't be fair, because each case must be won or lost on its facts, not on the personality of the lawyers, nor whether the lawyers are clever or not clever. It's got to be won on the facts. It's got to be won on whether it's just or not.
>
> *Id.* at 215-16.

Later in his argument he stated, "It's beyond me how companies can operate on that basis." *Id.* at 231. He told the jury that he was impressed with the testimony of one witness. *Id.* at 233. After an objection was sustained, Mr. Manzini immediately told the jury that the same witness " . . . was absolutely inscrutably truthful . . . ." *Id.* The Court instructed the jury that the lawyer's personal opinion was just not relevant to the case at all. *Id.* Immediately after the instruction, Mr. Manzini said regarding the same witness, "Trust me, it wasn't easy for him to come here." *Id.*

The jury instructions, which were printed and provided to each juror to take into the jury room, included an instruction regarding the weight the jury should give to the EEOC determination letters. (V15-238 at 71, 93-94). In the instructions conference prior to closing arguments, counsel for Daniels and St. Lot stated that he had no objections to the charge. (V14-237 at 193). Although he had some suggestions and requests regarding other portions of the charge, he said nothing about the cautionary instruction regarding the EEOC letters. *Id.* at 193-96. Judge Wiseman made some of the changes requested by Daniels and St. Lot. *Id.* at 195-96.

The jury returned a verdict which found that neither Daniels nor St. Lot had proven by a preponderance of the evidence that intentional race discrimination was a motivating factor in their discharge. (V15-236 at 103). The jury was polled, and each juror responded that the verdict was his or her verdict. *Id.* at 104.